

Decision 06-03-017

March 2, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning.	Rulemaking 04-04-003 (Filed April 1, 2004)
Order Instituting Rulemaking to Promote Consistency in Methodology and Input Assumptions in Commission Applications of Short-run and Long-run Avoided Costs, Including Pricing for Qualifying Facilities.	Rulemaking 04-04-025 (Filed April 22, 2005)

ORDER DENYING REHEARING OF DECISION (D.) 05-12-009

On April 22, 2004, we instituted Rulemaking (R.) 04-04-025 (“Avoided Cost Proceeding”) to

“serve[] as the Commission’s forum for developing a common methodology, consistent input assumptions and updating procedures for avoided costs across our various proceedings, and for adopting avoided cost calculations and forecasts that conform to those determinations. It is the forum for considering similarities as well as appropriate differences in methods and inputs for specific applications of avoided costs, including QF avoided cost pricing.”

(Order Instituting Rulemaking to Promote Consistency in Methodology and Input Assumptions in Commission Applications of Short-run and Long-run Avoided Costs, including Pricing for Qualifying Facilities, dated April 22, 2004, p. 2.) The Avoided Cost Rulemaking was subsequently consolidated with R.04-04-003, Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning (“Procurement Proceeding”) for the limited purpose of joint

evidentiary hearings to consider pricing and policy of qualifying facilities (“QFs”).¹ (See *Assigned Commissioners’ Ruling and Scoping Memo Consolidating R.04-04-003 and R.04-04-025 for the Limited Purpose of Joint Evidentiary Hearings on Policy and Pricing of Qualifying Facilities*, dated February 18, 2005.) It was anticipated that a decision addressing QF issues would be issued by the end of 2005. However, when it became apparent that this would not be the case, parties were directed to file comments on recommended Commission action for QF contracts expiring after January 1, 2006, and before the Commission issued a final order in the Combined QF Proceedings. (See RT Vol. PHC-2, pp. 149:13-150:13.)

On December 2, 2005, we issued Decision (D.) 05-12-009 (“Decision”) to address this limited issue. In the Decision, the Commission continued the interim relief provided in *Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development* [D.04-01-050] (2004) __ Cal.P.U.C.3d __ for QFs with expired or expiring contracts. Therefore, Pacific Gas and Electric Company (“PG&E”), Southern California Edison Company (“Edison”) and San Diego Gas & Electric Company (“SDG&E”) were ordered to enter into five-year SO1 contracts with QFs with contracts that expire or will expire between January 1, 2006 and the time a decision concerning QF pricing is issued. Pricing for the contracts would be pursuant to the short run avoided cost (“SRAC”) methodology ordered in *Decision Modifying Decision 96-12-028* [D.01-03-067] (2001) __ Cal.P.U.C.3d __, until a new SRAC pricing methodology is determined.

PG&E and Edison filed applications for rehearing of the Decision. The California Cogeneration Council (“CCC”) and the Independent Energy Producers

¹ In this order, we refer to the Avoided Cost Proceeding and Procurement Proceeding jointly as the “Combined QF Proceedings.”

Association, Cogeneration Association of California and Energy Producers and Users Coalition (“Joint Parties”) filed responses opposing the rehearing applications.

PG&E contends that the Decision fails to comply with the Public Utilities Regulatory Policies Act (“PURPA”) because “there is no factual basis on which to determine that the prices in the SO1 agreements comply with PURPA’s avoided cost limitation.” (PG&E’s Rhg. App., p. 3.) PG&E is in effect challenging the adequacy of the SRAC pricing methodology. However, PG&E is barred from raising such a challenge.

In D.01-03-067, we determined that the adopted methodology to calculate SRAC pricing complied with PURPA. (See *Decision Modifying Decision 96-12-028* [D.01-03-067]) (2001) __ Cal.P.U.C.3d __, as modified by *Order Granting Limited Rehearing of Decision (D.) 01-03-067 filed by QF Parties* [D.02-02-028, pp. 11-13 (slip op.).) The validity of this methodology was upheld by the California Court of Appeal, Second Appellate District in *Southern Cal. Edison Co. v. Public Utilities Com.* (“*Edison I*”) (2002) 101 Cal.App.4th 982 and reaffirmed in *Southern Cal. Edison Co. v. Public Utilities Com.* (“*Edison II*”) (2005) 128 Cal.App.4th 1. D.01-03-067 is a final decision, and the Court decisions affirming the SRAC methodology are also final. Accordingly, PG&E is barred from challenging the adequacy of this methodology by both Public Utilities Code section 1709 and the doctrine of collateral estoppel. (See Pub. Util. Code, §1709 [“In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.”]; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [“Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings.”].)

In addition, PG&E and Edison both assert that the Decision errs by only applying any changes to the SRAC pricing prospectively. (PG&E’s Rhg. App., pp. 3-4; Edison’s Rhg. App., p. 4.) They maintain that the Commission is required to order a

“retroactive true-up” in the event SRAC prices are found to exceed utility avoid costs. This argument is premature.

The Decision recognizes that it does not address all issues related to any changes in SRAC pricing for QFs. In response to various comments raised by parties, including a request that the Decision provide for a retroactive true-up of prices, we stated:

“this decision addresses a discreet problem and only provides interim relief for contracts expiring between January 1, 2006 and when the Commission issues a final decision in the combined QF dockets. The parties will have ample opportunity to develop a full record in the combined dockets, and they will be properly addressed there.”

(D.05-12-009, p. 9.) Further, as noted by the Second Appellate District: “[i]t is incumbent upon [the utility] to present evidence to demonstrate that the extensions being considered would impose unlawful pricing in violation of PURPA.” (*Southern Cal. Edison Co. v. Public Utilities Com.*, *supra*, 128 Cal.App.4th at p. 11.)

This is precisely what is being done now. The Combined QF Proceedings held evidentiary hearings between January 18, 2006 and February 2, 2006. Briefing of the issues is expected to be completed on March 17, 2006. (RT Vol. 30, pp. 4434:23-27 & 4435:23-25.) Thus, the full administrative record has yet to be fully developed and considered. Until then, it is unknown whether the current SRAC methodology yields prices that do not represent a utility’s avoided cost, and if so, for what period of time. Therefore, a provision for retroactive adjustment of SRAC prices could be construed as prejudging the outcome of the Combined QF Proceedings. Accordingly, we properly declined to address the issue of a retroactive adjustment of SRAC prices.²

² Edison had raised a similar challenge to identical language contained in D.04-01-050 concerning extension of expiring and soon to expire QF contracts. We rejected this argument in D.04-07-037, noting that it was premature. (See *Order Modifying Decision (D.) 03-12-062 and D.04-01-050, and Denying Rehearing of D.03-12-062 and D.04-01-050 as Modified* [D.04-07-037, p. 7 (slip op.)] (2004) ___ Cal.P.U.C.3d ___.) The Second Appellate District affirmed D.04-01-050 and D.04-07-037 in *Edison II*.

For these reasons, we conclude that PG&E and Edison have failed to demonstrate grounds for finding legal error.

Therefore **IT IS ORDERED** that rehearing of Decision 05-12-009 is denied.

This order is effective today.

Dated March 2, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG